(1)

Supreme Court, U.S.
FILED

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No. _____

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In The

Supreme Court of the United States

STATE OF NEBRASKA,

Petitioner,

vs.

JUAN FRANCO, JR.,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the highest court of a state may evade federal constitutional scrutiny of a state statute simply by characterizing that statute as civil or criminal?

2. Whether a state forfeiture statute which has been described by the Nebraska Legislature as being civil in nature, provides for the bringing of an action against *property* as opposed to an individual accused of a crime, shifts the burden of proof to a claimant, establishes a burden of proof of a preponderance of the evidence, and does not provide for trial by jury, may properly be characterized as criminal in nature, under a Fifth Amendment double jeopardy analysis, and be consistent with this Court's opinion in *United States v. Ursery*?

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PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Nebraska Supreme Court.

OPINIONS BELOW

The petitioner seeks a writ of certiorari from the opinion of the Nebraska Supreme Court filed in *State v. Franco,* 257 Neb. 15, 594 N.W.2d 633 (1999). (App. 1)

STATEMENT OF JURISDICTION

(i)

The opinion in question was filed May 28, 1999.

(ii)

Rehearing was sought by the State and denied on June 23, 1999.

(iii)

The jurisdiction of this Court to review the judgment in question is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

> except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fifth Amendment to the Constitution of the United States

Neb. Rev. Stat. § 28-431 (Cum. Supp.1998) (App. 20).

STATEMENT OF THE CASE

The respondent, Juan Franco, Jr. (hereinafter "Franco"), was arrested on December 21, 1997 and charged with possession of a controlled substance with intent to deliver. At the time of the arrest law enforcement officers also seized the pickup truck Franco was driving and $2,190 in currency which Franco had in his possession.

Because Neb. Rev. Stat. § 28-431(4) (Cum. Supp. 1998) requires the initiation of forfeiture proceedings within 10 days of the seizure of the property in question, on December 26, 1997 the State filed a forfeiture action against the truck and currency seized at the time of Franco's arrest.

Formal charges were filed against Franco on February 9, 1998.

Trial of the forfeiture proceeding commenced on February 17, 1998, but was not concluded.

The next day, February 18, 1998, Franco filed a plea in bar in his criminal proceeding claiming that the prosecution of his criminal charges, now that a forfeiture proceeding had been initiated, would violate his right against double jeopardy guaranteed by the 5th Amendment.

The state trial court denied Franco's plea in bar and Franco appealed.

The Nebraska Supreme Court held that the protections provided Franco under our federal constitution and the Nebraska Constitution are identical, that § 28-431 forfeiture proceedings were criminal in nature, that jeopardy attached in the § 28-431 forfeiture proceeding when evidence was first presented to the trier of fact, and therefore the trial court erred in not granting Franco's plea in bar. The Nebraska Supreme Court remanded the matter to the state trial court with directions to dismiss the criminal charges against Franco. (App. 17)

The Nebraska Supreme Court subsequently denied the State's motion for rehearing (App. 19) and a subsequent motion to withhold its mandate pending our application for a writ of certiorari. (App. 18)

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW

In this case, the Nebraska Supreme Court relied upon this Court's opinion in *United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996) to conclude that the Double Jeopardy Clause of the Fifth Amendment of our federal constitution is violated by the prosecution of an individual charged with a drug-related offense whose property was the subject of a pending proceeding authorized by Neb. Rev. Stat. § 28-431 (Cum. Supp. 1998).

The Nebraska Supreme Court found § 28-431 proceedings to be "criminal" in nature, despite the fact that the Nebraska Legislature had (1) specifically stated the process in question was to be deemed civil, and the statute (2) provides for the bringing of an action against *property*, not an individual accused of a crime, (3) provides, once the State has established the connection between the property proceeded against and criminal activity, that the burden of proof shifts to the party seeking to exempt the property in question from forfeiture, (4) establishes a preponderance of the evidence as a claimant's burden of proof; and (5) denies a claimant the right to a jury.

In ruling as it did the Nebraska Supreme Court articulated no distinction between the protections afforded Franco under our federal constitution and the *Constitution of the State of Nebraska*.

We believe that ruling of the Nebraska Supreme Court directly contradicts this Court's holding and analysis in *United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996) (hereinafter "*Ursery*").

II.

IN THE CONTEXT OF THE FEDERAL CONSTITUTIONAL QUESTION PRESENTED, THE APPROPRIATE CHARACTERIZATION OF § 28-431 PRESENTS A QUESTION OF FEDERAL CONSTITUTIONAL LAW MERITING THE *DE NOVO* REVIEW OF THIS COURT.

The Nebraska Supreme Court's classification of § 28-431 as being criminal in nature is not merely a mistake of state law. Significant federal constitutional implications exist.

If *de novo* review by this Court of the Nebraska Supreme Court's decision below were not required, then the highest court of a state could just as easily mischaracterize as "civil in nature" a state statute imposing imprisonment as a punishment for certain prohibited behavior and thus evade this Court's review of the federal constitutional implications of that statute. Deferring to a state court's characterization of a state statute under these circumstances would promote a wholly unsatisfactory diversity in the application and enforcement of federal constitutional law among the various states.

In fact, the Nebraska statute is neither criminal nor a fixed civil penalty statute, but one which creates an *in rem* proceeding "designed to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." *Ursery*, 135 L.Ed.2d at 565.

The determination into which of these classifications a particular state statutory scheme appropriately is placed for purposes of a federal constitutional double jeopardy analysis must be either a pure question of federal constitutional law or a mixed question of fact and law, both of which require the *de novo* review of that state court decision by this Court. *Ornelas v. United States*, 517 U.S. 690 (1996); *Thompson v. Keohane*, 516 U.S. 99 (1995); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Brinegar v. United States*, 338 U.S. 160 (1949).

As such, the Nebraska Supreme Court's mis-characterization of § 28-431 as being criminal in nature cannot be dispositive of the federal Double Jeopardy Clause question we present here.

III.

RULE 10 CONSIDERATIONS

A.

The Nebraska Supreme Court's decision is in conflict with this Court's ruling in *United States v. Ursery*

We believe the ruling of the Nebraska Supreme Court in the present case is in direct conflict with the holding and federal constitutional analysis employed in this Court's opinion in *Ursery*.

In *Ursery* this Court held:

> [I]n a long line of cases, this Court has considered the application of the Double Jeopardy Clause to civil forfeitures, consistently concluding that the Clause does not apply to such actions because they do not impose punishment.

Id., 135 L.Ed.2d at 559. The fact that the behavior which triggered the action against the property sought to be forfeited to the State was a criminal act does not answer the question of whether the forfeiture represents "punishment" in a constitutionally relevant sense. *Id.*, 135 L.Ed.2d at 561.

1. Legislative intent

In *Ursery*, this Court clearly stated that a constitutionally appropriate analysis of this question begins with a determination of the intent of the legislature which enacted the forfeiture statute. *Ursery*, 135 L.Ed.2d at 561. The Nebraska Legislature had spoken to this very question when it first enacted § 28-431. As originally enacted, § 28-431 provided:

> Any person having an interest in the conveyance proceeded against, or any person against whom a civil or criminal liability would exist if such conveyance is in violation of the provisions of this article may, within twenty days following the sheriff's taking of possession, appear and file answer or demurrer to the complaint. The answer or demurrer shall allege the interest or liability of the party filing it. ***In all other respects the issue shall be made up as in other civil actions.***

Laws 1977, L.B. 38 (emphasis added). In the course of subsequent amendments of § 28-431, including adding drug paraphernalia and money as items that may be forfeited, the language emphasized above was dropped from the statute, but the *substantive procedural provisions of the statute remain unchanged* since that clear articulation of

legislative intent. Additional evidence of the intent of the Nebraska Legislature regarding the nature of § 28-431 proceedings can be found in the floor debate of a subsequent amendment to § 28-431. This statute was amended in 1980 by L.B. 991, which added drug paraphernalia as an item that could be forfeited pursuant to § 28-431. During floor debate on LB 991, Senator Nichol stated: ". . . . Three, the final committee amendment is a technical amendment which plugs into ***the civil forfeiture sections of our existing law***. These amendments will provide direction to the courts to dispose of drug paraphernalia which has been ***civilly*** forfeited." *Floor Debate of L.B. 991*, 86th Nebraska Legislature, Second Session, p. 9930 (1980) (emphasis added).

Furthermore, the Nebraska Supreme Court's reliance upon where the statute was placed within the Nebraska statutes and how that statute was captioned, as indicia of legislative intent (App. 9), is wholly misguided. It is the Nebraska Revisor of Statutes, not the Nebraska Legislature, who determines the placement of enacted legislation within the Nebraska statute books and the captions which will be placed upon them. Neb. Rev. Stat. §§ 49-702, 49-705, 49-805 (Reissue 1998).

On this legislative record, there exists no basis upon which one may rationally conclude that the originally expressed intention of the Nebraska Legislature, that these proceedings be treated as being civil in nature, has changed. Yet the Nebraska Supreme Court deviated from the first step of the federal constitutional analysis required by *Ursery* by ignoring that clear expression of legislative intent. Instead, the Nebraska Supreme Court

relied upon *its own* pre-*Ursery* rulings,[1] which suffer the same analytical weakness as the present case, and there the Nebraska Supreme Court's analysis of this federal constitutional question ceased.

As this Court noted in *Ursery*, lower courts had issued pre-*Ursery* opinions based upon *United States v. Halper*, 490 U.S. 435 (1989), *Austin v. United States*, 509 U.S. 602 (1993), and *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 128 S.Ct. 1937, 128 L.Ed.2d 767 (1994) which "misread"[2] the meaning of those cases and thus misapplied the Double Jeopardy Clause to otherwise civil forfeiture proceedings. This case represents a similar erroneous resolution of a significant federal Double Jeopardy Clause question, this time by Nebraska's highest court.

2. Comparison with 21 U.S.C. § 981

In *Ursery*, this court found the federal forfeiture statute, 21 U.S.C. § 981, to be civil in nature. Section 28-431

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[1] The Nebraska Supreme Court attempts to buttress its resolution of this federal constitutional question upon a series of its own prior rulings. (App. 9-12) All of those rulings were issued prior to this Court's opinion in *Ursery*, and it is important to note that in none of those cases did the Nebraska Supreme Court ever offer an analysis of *why* it concluded that § 28-431 proceedings were criminal in nature. Thus, when the Nebraska Supreme Court states, "[w]e have historically treated forfeiture actions pursuant to § 28-431 as being criminal . . . ", that is a "history" without any federal constitutional analytical foundation whatsoever. (App. 11)

[2] *Ursery*, 135 L.Ed.2d at 564.

bears striking similarities to the statute in question in *Ursery*.

The purpose of these statutes is clearly the same. As noted immediately above, the intent of the Nebraska Legislature in enacting § 28-431 was the same as the purpose and intent of the United States Congress when it enacted 21 U.S.C. § 881 and 18 U.S.C. § 981 (West 1999).

In comparing the statutory language of § 28-431 and 21 U.S.C. § 981, there is no doubt that § 28-431 was patterned after 21 U.S.C. § 981. The language is almost identical with respect to those items which may be forfeited as well as the reasons for which those items may be forfeited. The manner in which forfeiture proceedings are conducted is similar in both statutes. The Nebraska statute and the federal statute accomplish the same things, for the same reasons, and they do so in a similar fashion.

While it is true that there are slight variations (for example, the Nebraska statute does not allow for the forfeiture of real property), none of the variations give any indication that the Nebraska Legislature intended § 28-431 forfeiture proceedings to be criminal in nature or intended them to constitute criminal punishment. The intent of the Nebraska Legislature in enacting § 28-431 was the same as the intent of the United States Congress when it enacted 21 U.S.C. § 881. There are no substantive differences in the two statutes which would explain the diverse result of the Nebraska Supreme Court's analysis of this federal constitutional question or the diverse

results of its own rulings upon this question when evaluating other Nebraska forfeiture statutes.[3]

3. The statute clearly provides a civil, *in rem* remedy as described by *Ursery*, not a criminal sanction.

If the above noted legislative history is not dispositive of the Nebraska Supreme Court's fundamental error in applying an *Ursery* analysis in this case, the substantive provisions of the statute itself demonstrate that the proceeding created can only be accurately classified as civil in nature for federal Double Jeopardy Clause purposes.

Nebraska has historically employed a presumption that the Nebraska Legislature drafts legislation consistent with the requirements of our state and federal constitutions and has imposed upon the Nebraska courts an obligation to interpret legislation in such a matter as to render the legislation constitutional. *State v. Sinica*, 220 Neb. 792, 372 N.W.2d 445 (1985). Here the Nebraska Supreme Court has done exactly the opposite. By concluding § 28-431 is "criminal in nature" the Nebraska Supreme Court has ignored the substance of the statute and in so doing arguably rendered an otherwise appropriate, civil *in rem* forfeiture statute unconstitutional

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[3] The Nebraska Supreme Court does not explain how its conclusion that under our federal constitution § 28-431 is criminal in nature squares with its prior ruling that Nebraska's gambling forfeiture statute, Neb. Rev. Stat. § 28-1111 (Reissue 1985), which is also contained within Nebraska's criminal code, is an *in rem* proceeding and thus civil in nature. See, *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991).

because that statute clearly does not provide the hallmark procedural requirements constitutionally required of a "criminal" proceeding: No jury is allowed; The burden of proof shifts from the State to the claimant; The burden of proof is a preponderance of the evidence. These are wholly acceptable procedures in civil proceedings, but the antithesis of constitutionally appropriate criminal proceedings.

B.

The Nebraska Supreme Court's decision is at odds with decisions of the federal circuit courts.

The federal circuit courts have followed this Court's ruling in *Ursery* and as a result have reached conclusions upon the questions presented at odds with the decision of the Nebraska Supreme Court in the instant case.

The opinion of the Nebraska Supreme Court in this case also is at odds with the following decisions of the federal circuit courts finding that state forfeiture proceedings do not bar subsequent criminal prosecutions under the Double Jeopardy Clause, based upon this Court's holding in *Ursery*.

1.

United States v. Navarro, 92 F.3d 1194 (9th Cir. 1996) (Unpublished text at 1996WL426883) held that proceedings under the California forfeiture statute did not bar subsequent federal prosecution for the offense which gave rise to the seizure of the property forfeited in state court.

2.

Predka v. Polk County District Court, 100 F.3d 959 (8th Cir. 1996) (Unpublished text at 1996WL656115) held that state forfeiture proceedings followed by a state criminal prosecution did not violate the Double Jeopardy Clause under *Ursery*.

3.

In *United States v. Williams*, 132 F.3d 1055 (5th Cir. 1998) the court employed a *Ursery* analysis to determine the federal constitutional implications of a federal forfeiture statute which was not the subject of the litigation in *Ursery*.

In concluding that 8 U.S.C. § 1324(b) had no Double Jeopardy Clause implications, it weighed the following: (1) The proceeding was *in rem;* (2) The statute established procedures consistent with those employed in civil proceedings; and (3) The statute served the non-punitive goal of forfeiting only property used to commit a violation of law. *Williams*, 132 F.3d at 1061.

Each of those criteria, when applied to § 28-431, leads one to the conclusion that the Nebraska statute is civil in nature and carries no Double Jeopardy Clause implications. That is exactly the opposite conclusion reached by the Nebraska Supreme Court below.

CONCLUSION

This is not a case of a conflict upon a disputed question of federal constitutional law among the circuit

courts or among the highest courts of the states. This is a case of a conflict between a decision of this Court and a decision of the Nebraska Supreme Court upon a *settled* question of federal constitutional law. Other courts have not found *Ursery* that difficult to fathom and apply.

However, the Double Jeopardy Clause of the 5th Amendment should have the same meaning and application in the State of Nebraska as in the other 49 states of this union. If the decision of the Nebraska Supreme Court in this case is allowed to stand, that worthy goal will have escaped us.

We urge this court to grant the writ prayed for and remand this case to the Nebraska Supreme Court for an analysis of this federal constitutional question consistent with this Court's ruling in *Ursery*.

Respectfully submitted,

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OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

State of Nebraska, Appellee,

v.

Juan Franco, Jr., Appellant.

Case Caption

State v. Franco

Filed May 28, 1999. No. S-98-645.

Appeal from the District Court for Lancaster County: Paul D. Merritt, Jr., Judge. Reversed and remanded with directions to dismiss.

J. Malachy Sullivan, of Sodoro, Daly & Sodoro, P.C., for appellant.

Don Stenberg, Attorney General, and Mark D. Raffety for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Juan Franco, Jr., was charged by information with one count of possession of a controlled substance with intent to deliver. Franco filed a plea in bar, alleging that the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions barred his prosecution because jeopardy had attached at the forfeiture trial involving property

which was owned by Franco and in his possession at the time of the arrest. The district court denied the plea in bar, and Franco timely perfected this appeal.

SCOPE OF REVIEW

An appeal from a denial of a plea in bar involves a question of law. *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998).

Regarding questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998).

FACTS

On December 21, 1997, Franco was stopped in Lancaster County by the Nebraska State Patrol and placed under arrest for suspicion of possession of a controlled substance with intent to deliver. At the time of the arrest, the State Patrol also seized Franco's 1992 Chevrolet pickup and $2,190 in U.S. currency which Franco had in his possession.

On December 26, 1997, the State filed a forfeiture action against the pickup and the currency pursuant to Neb. Rev. Stat. § 28-431 (Cum. Supp. 1998). The petition alleged that on December 21, troopers from the Nebraska State Patrol seized $2,190 and Franco's pickup, which were in Franco's possession and used to facilitate a violation of chapter 28, article 4, of the Nebraska Revised Statutes. The petition requested that such property be forfeited to the State as provided by law.

On February 9, 1998, the State filed an information charging Franco with possession of a controlled substance with intent to deliver, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1995). On February 17, the forfeiture proceeding commenced, and evidence was adduced. The trial was not completed on that date, and the district court held the matter in recess until such time as the trial could be completed. The next day, Franco filed a plea in bar, requesting the information be dismissed on the ground that prosecution of the possession case violated his double jeopardy protection as set forth in the 5th and 14th Amendments to the U.S. Constitution and article I, § 12, of the Nebraska Constitution.

On March 12, 1998, a hearing was held on the plea in bar, and the matter was taken under advisement. On June 3, the district court entered an order denying the plea in bar. The court stated:

> Section 28-416(1)[(a)] is designed to punish a person who possesses and delivers controlled substances illegally, with incarceration and/or a fine or probation. Section 28-431 is designed to be punitive against a person who, *inter alia*, uses money or vehicles to violate controlled substance laws, by forfeiture of his or her money and/or vehicles, as the case may be. While § 28-416(1)[(a)] and § 28-431 can, and usually do, grow out of the nucleus of operative facts, they are separate offenses under the test enumerated in *Blockburger v. United States*, 284 U.S. 299 (1932). On the one hand, it is one offense to possess cocaine, with the intent to distribute, while, on the other hand, it is a separate offense to use a vehicle to illegally transport cocaine

> and a separate offense to use money to facilitate illegal trafficking in cocaine.
>
> The criminal case is not barred by the forfeiture case, since the two proceedings involve two separate offenses, under the *Blockburger* test.

A final disposition regarding the forfeiture action had not been rendered at the time the district court denied the plea in bar.

ASSIGNMENT OF ERROR

Franco asserts that the district court erred in denying his plea in bar because the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions prohibited the State from bringing a criminal proceeding against him after jeopardy had already attached in a forfeiture action arising from the same set of facts.

ANALYSIS

The issue is whether the prior forfeiture action barred the subsequent criminal proceeding against Franco. We begin our analysis with *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996). In *United States v. Ursery, supra*, two cases were consolidated for purposes of the opinion, and a brief factual background is as follows:

In case No. 95-345, the government instituted civil forfeiture proceedings under 21 U.S.C. § 881(a)(7) against Ursery's house, alleging that it had been used to facilitate illegal drug transactions. Ursery settled that claim, but he

was later convicted of manufacturing marijuana, in violation of 21 U.S.C. § 841(a)(1).

In case No. 95-346, Charles Arlt and James Wren were convicted of conspiracy to aid and abet the manufacture of methamphetamine, in violation of 21 U.S.C. § 846; conspiracy to launder monetary instruments, in violation of 18 U.S.C. § 371; and other counts of money laundering, in violation of 18 U.S.C. § 1956. The government filed a civil in rem complaint against various property seized from, or titled to, Arlt and Wren, or Arlt's corporation, alleging that each item was subject to forfeiture under 18 U.S.C. § 981(a)(1)(A) because it was involved in money laundering violative of 18 U.S.C. § 1956 and 21 U.S.C. § 881(a)(6) as the proceeds of felonious drug transactions. Litigation of the forfeiture action was deferred, and following the criminal convictions, the district court granted the government's motion for summary judgment in the forfeiture proceeding.

Relying upon *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), and *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), the U.S. Court of Appeals for the Sixth Circuit reversed Ursery's conviction, and the U.S. Court of Appeals for the Ninth Circuit reversed the forfeiture judgment against Arlt and Wren on the basis that the Double Jeopardy Clause prohibited the government from both punishing a defendant for a criminal offense and seeking forfeiture of his property for that same offense in a separate civil proceeding. The U.S. Supreme Court reversed the courts of appeals' judgment, concluding that the forfeiture actions were civil proceedings and that the Double Jeopardy Clause was not implicated.

The Court noted in *United States v. Ursery, supra,* that Congress has long authorized the government to bring parallel criminal actions and in rem civil forfeiture actions based on the same underlying events. Relying on its opinion in *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984), the Court stated that for double jeopardy purposes, an in rem civil forfeiture is a remedial civil sanction, distinct from potentially punitive in personam civil penalties, such as fines, and thus does not constitute a punishment. The Court proceeded to apply a two-part test to determine whether any of the forfeitures at issue were civil proceedings.

The test in *United States v. Ursery, supra,* inquired as to (1) whether Congress intended the statutory sanction to be criminal or civil and (2) whether the statutory sanction is so punitive in purpose or effect as to transform what was clearly intended as a civil sanction into a criminal one. See, also, *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

We recently utilized this test to determine whether an administrative license revocation proceeding was civil or criminal in nature for purposes of the Double Jeopardy Clause. See *State v. Howell,* 254 Neb. 247, 575 N.W.2d 861 (1998). The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution. *Id.*

Whether the Legislature intended § 28-431 to define a civil or criminal sanction is a matter of statutory construction. Interpretation of a statute presents a question of law. *State ex rel. Garvey v. County Bd. of Comm.*, 253 Neb.

694, 573 N.W.2d 747 (1998). Thus, we are obligated to reach a conclusion independent of the determination reached by the trial court. See *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998).

Section 28-431 provides in relevant part:

> (1) The following shall be seized without warrant . . . and the same shall be subject to forfeiture: . . . (f) all conveyances including, but not limited to, aircraft, vehicles, or vessels which are used, or intended for use, in transporting any controlled substance with intent to manufacture, distribute, deliver, dispense, export, or import such controlled substance in violation of the act; and (g) all money used, or intended to be used, to facilitate a violation of the act.
>
> . . . .
>
> (4) When any property described in subdivision (1)(f) or (g) of this section is seized, the person seizing the same shall cause to be filed, within ten days thereafter, in the district court of the county in which seizure was made, petition for disposition of such property. . . . The petition shall describe the property, state the name of the owner if known, allege the essential elements of the violation which is claimed to exist, and conclude with a prayer for disposition. . . . If the owner is unknown or there is a reasonable probability that there are unknown persons with interests in the property, the county attorney shall provide notice of the seizure and petition for disposition by publication. . . .

> At any time after seizure and prior to court disposition, the owner of record of such property may petition the district court of the county in which seizure was made to release such property, and the court shall order the release of the property upon a showing by the owner that he or she had no knowledge that such property was being used in violation of the Uniform Controlled Substances Act.
>
> . . . If the claimant proves by a preponderance of the evidence that he or she (a) has not used or intended to use the property to facilitate an offense in violation of the act, (b) has an interest in such property as owner or lienor or otherwise, acquired by him or her in good faith, and (c) at no time had any knowledge that such property was being or would be used in, or to facilitate, the violation of the act, the court shall order that such property or the value of the claimant's interest in such property be returned to the claimant.

In *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996), the Court evaluated 21 U.S.C. § 881 and 18 U.S.C. § 981 to determine whether forfeitures pursuant to these statutes violated the Double Jeopardy Clause. The Court concluded that there was little doubt that Congress intended forfeitures pursuant to 21 U.S.C. § 881 and 18 U.S.C. § 981 to be civil in nature. As support for this conclusion, the Court noted that 18 U.S.C. § 981 was entitled "Civil forfeiture," 518 U.S. at 288, and that both of the statutes were considered *"in rem,"* 518 U.S. at 289, and did not require notice to the owner of the property, allowed unclaimed property to be

summarily forfeited, and placed the burden of proof on the property owner.

In contrast to 18 U.S.C. § 981, § 28-431 is not entitled "Civil forfeiture." Rather, it is found in chapter 28 of the Nebraska Revised Statutes, which is entitled "Crimes and Punishments." The placement of § 28-431 under this caption is some evidence but is not decisive of legislative intent to make the statute criminal in nature.

Unlike the federal courts, we have never directly addressed whether a forfeiture pursuant to § 28-431 is a civil in rem proceeding. In *State v. $15,518*, 239 Neb. 100, 474 N.W.2d 659 (1991), we began that analysis with the statement that we considered a forfeiture pursuant to § 28-431 to be in rem. However, we offered no explanation why we did not address the issue of legislative intent to treat forfeitures as civil or criminal in nature. On numerous occasions, we have concluded that § 28-431 was criminal in nature, a conclusion which undermines the claim that § 28-431 forfeitures are in rem. See, *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995) (holding that review for sufficiency of evidence in forfeiture proceeding pursuant to § 28-431 is same as in criminal case); *State v. 1987 Jeep Wagoneer*, 241 Neb. 397, 488 N.W.2d 546 (1992) (noting that § 28-431(4) requires State to prove beyond reasonable doubt that property was used in violation of chapter 28); *State v. One 1987 Toyota Pickup*, 233 Neb. 670, 447 N.W.2d 243 (1989) (suggesting that Double Jeopardy Clause applied to forfeiture proceeding pursuant to § 28-431); *State v. $3,067.65 in U.S. Currency*, 4 Neb. App. 443, 545 N.W.2d 129 (1996) (holding that sufficiency of evidence review is same in criminal cases and in forfeiture cases); *State v. One 1986*

Toyota 4-Runner, 1 Neb. App. 1138, 510 N.W.2d 556 (1993) (holding that forfeiture actions under § 28-431 are criminal actions and, therefore, State's right to appeal is limited to terms of Neb. Rev. Stat. §§ 29-2315.01 through 29-2316 (Reissue 1995)). Contra, see, *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991) (holding that actions pursuant to Neb. Rev. Stat. § 28-1111 (Reissue 1995) for forfeiture of property are generally considered to be in rem, to sound in equity, and to apply a burden of proof of less than beyond a reasonable doubt).

Section 28-431 provides that at any time after seizure and prior to court disposition, the owner of record of the property may petition the district court of the county in which seizure was made to release such property and that the court shall order release of the property upon a showing by the owner that he or she had no knowledge that the property was being used in violation of chapter 28. Specifically, a claimant must show that he or she has not used or intended to use the property to facilitate an offense in violation of chapter 28; has an interest in the property as owner, lienor, or otherwise; acquired the property in good faith; and at no time had any knowledge that the property was being or would be used in, or to facilitate, a violation of chapter 28.

Section 28-431 then provides in relevant part:

> If there are no claims, if all claims are denied, or if the value of the property exceeds all claims granted *and it is shown beyond a reasonable doubt* that such property was used in violation of the act, the court shall order disposition of such property at such time as the property is no

> longer required as evidence in any criminal proceeding.

(Emphasis supplied.) Thus, the State must show beyond a reasonable doubt that the property seized was used in violation of chapter 28, article 4. This indicates the Legislature intended that § 28-431 should be considered criminal in nature.

Since *State v. One 1987 Toyota Pickup, supra,* this court has determined that the Legislature intended forfeiture actions pursuant to § 28-431 to be criminal proceedings. That interpretation was reinforced in *State v. 1987 Jeep Wagoneer, supra,* and *State v. One 1986 Toyota 4-Runner, supra.* The Legislature, having not attempted to modify the forfeiture proceeding under chapter 28, article 4, has acquiesced in our determination that actions pursuant to § 28-431 are criminal proceedings. In the absence of a legislative amendment to § 28-431, we cannot now say that the Legislature's intent has changed. *State v. One 1987 Toyota Pickup, supra,* still sets forth our interpretation of the legislative intent of § 28-431 – that the statute is criminal in nature.

Since we have historically treated forfeiture actions pursuant to § 28-431 as being criminal, we need not address the second part of the test announced in *United States v. Ursery,* 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996), which inquires as to whether a civil sanction is so punitive in purpose that it transforms the civil sanction into a criminal sanction.

We next consider whether Franco's conviction was barred by the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution or Neb. Const. art. I,

§ 12. The 5th Amendment, which is made applicable to the states through the 14th Amendment, provides in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Neb. Const. art. I, § 12, provides: "No person shall . . . be twice put in jeopardy for the same offense." The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998).

It is well established in Nebraska that under Neb. Const. art. I, § 12, jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). A petition for the disposition of property seized from Franco during his arrest was filed by the State on December 26, 1997. The petition alleged that Franco's currency and pickup should be forfeited pursuant to § 28-431. We conclude that in forfeiture proceedings, jeopardy attaches when evidence is first presented to the trier of fact. On February 17, 1998, the forfeiture proceeding began. The parties filed a joint stipulation to some of the facts, and then, the trial court noted in its journal that after adducing evidence, it recessed the proceeding. Therefore, jeopardy attached in the forfeiture proceeding. Franco asserts that to now prosecute him for a crime subjects him to multiple punishments for the same offense, in violation of the Double Jeopardy Clause.

In *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the U.S. Supreme Court announced a rule of statutory construction. The Court

held that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.

In other words, the *Blockburger*, or "same elements," test examines whether one offense contains an element not contained in the other. See *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). If the two offenses contain the same elements, then they are the same offense and double jeopardy bars additional punishment and successive prosecution. *Id.; Blockburger v. United States, supra.* If the two offenses contain different elements, then they are not the same offense and double jeopardy is not a bar to additional punishment or successive prosecution. *United States v. Dixon, supra.*

Other jurisdictions that have characterized forfeiture actions as criminal proceedings have also relied upon the *Blockburger* test to decide whether double jeopardy is violated. See, *Chacon-Sanchez v. U.S.*, No. C-94-20768-JW, 1996 WL 341115 (N.D. Cal. June 13, 1996) (holding that punishment arising from civil forfeiture and imposition of separate criminal punishment do not constitute double jeopardy if punishments are not based upon same offense); *Valencia Lucena v. U.S.*, 933 F. Supp. 129 (D. Puerto Rico 1996) (holding that when forfeiture required proof of criminal offense, *Blockburger* prohibited subsequent prosecution); *State v. Cole*, 128 Wash. 2d 262, 906 P.2d 925 (1995) (dissent concluded forfeitures were punishment and held that under *Blockburger* test, forfeiture was barred, since it required proof of criminal violation).

In the case at bar, the district court, using *Blockburger*, analyzed §§ 28-416(1)(a) and 28-431. The court stated that violations of §§ 28-416(1)(a) and 28-431 can and usually do arise out of the same factual circumstances. The court found, however, that §§ 28-416(1)(a) and 28-431 define separate offenses because § 28-416(1)(a) addressed possession and delivery of a controlled substance, while in this case, § 28-431 addressed the use of a vehicle to illegally transport a controlled substance or the use of money to facilitate illegal trafficking of controlled substances.

We conclude, as did the district court, that the use of money or the use of a vehicle under § 28-431 is not an element of the violation under § 28-416(1)(a) and that such use need not be proved to establish a possession with intent to distribute. However, *Blockburger* requires the court to consider whether § 28-431 requires proof of any element that is not an element of proof of possession with intent to distribute under § 28-416(1)(a). See, also, *Rutledge v. United States*, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996). Upon examination, we are unable to find any element within § 28-431 that is not a part of § 28-416(1)(a). A violation of § 28-431 necessarily requires proof of a violation of § 28-416(1)(a).

Prior to the U.S. Supreme Court's decision in *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996), a similar situation was analyzed by the U.S. District Court in *Valencia Lucena v. U.S., supra*. There, a defendant had been charged on May 10, 1989, with conspiracy to import cocaine, in violation of 21 U.S.C. § 963, and conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846. The defendant

was subsequently convicted and sentenced, and in parallel proceedings, the government sought forfeiture of property belonging to the defendant which was allegedly used to commit or facilitate the commission of the underlying drug offenses, in violation of 21 U.S.C. § 881(a)(7). In that proceeding, the government sought forfeiture of the defendant's residence. Since this case was decided prior to *Ursery*, the court analyzed the two charges as punishment imposed by the government under the analysis in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

In analyzing the two punishments, the U.S. District Court in *Valencia Lucena v. U.S., supra*, stated that while the forfeiture action required proof of an element not contained in the criminal charge, i.e., that the property was used to facilitate a drug trafficking crime, the criminal charge did not contain an element not included in the forfeiture action. This was so because the forfeiture action required proof of the criminal offense, as demonstrated by the fact that the court relied on the defendant's criminal conviction in finding that he was collaterally estopped from asserting a claim to the property. Any forfeiture under the statute required a preceding violation of the controlled substance statutes. The court noted that the criminal offense was, in essence, subsumed by the forfeiture statute and thus did not require an element of proof that was not required by the forfeiture action. In the case at bar, § 28-416(1)(a) is subsumed by § 28-431.

There may be situations where a defendant is not charged pursuant to § 28-416(1)(a) but is subject to forfeiture of property under § 28-431; for example, if the defendant knew that someone else was using the defendant's

vehicle to facilitate a violation of chapter 28, article 4. However, that situation is not before us.

The *Blockburger* test is applied to prevent double punishment in a situation where the Legislature has in fact intended to provide a single punishment for the offense. Double jeopardy is inapplicable to those cases where the Legislature has intended to punish cumulatively in the same proceeding.

In *State v. Detweiler*, 249 Neb. 485, 496, 544 N.W.2d 83, 91 (1996), we noted:

> "[S]imply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. . . .
>
> "Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial."

Quoting *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).

We conclude that the Legislature intended that a defendant could be subject to cumulative punishments under §§ 28-416(1)(a) and 28-431. Where the Legislature has demonstrated an intent to permit cumulative punishments, the Double Jeopardy Clause is not violated as long

as the cumulative punishments are imposed in a single proceeding. *State v. Detweiler, supra.*

CONCLUSION

In the case at bar, Franco seeks to vacate his criminal conviction by showing that jeopardy first attached in the forfeiture proceeding. When the Double Jeopardy Clause applies, it is the second proceeding that is constitutionally endangered. *U.S. v. Pierce,* 60 F.3d 886 (1st Cir. 1995). Here, as the district court correctly determined, jeopardy attached when the judge began to hear the evidence on the forfeiture issue. See *State v. Detweiler, supra.* Since jeopardy attached as to the forfeiture, the district court erred in denying Franco's plea in bar to the possession charge. We therefore reverse the judgment of the district court and remand the cause with directions to sustain the plea in bar and dismiss the charge brought pursuant to § 28-416(1)(a).

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
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LINCOLN, NE 68509
(402) 471-3731

July 12, 1999

ATTORNEY GENERAL'S OFFICE
2115 State Capitol
Lincoln, NE 68509

IN CASE OF: S-98-0645, State v. Juan Franco, Jr.

Appellee Motion to Stay Mandate **filed** 07/07/99 **has been reviewed by the court and the following order entered:** Overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 STATE CAPITOL BUILDING
LINCOLN, NE 68509
(402) 471-3731

June 23, 1999

ATTORNEY GENERAL'S OFFICE
2115 State Capitol
Lincoln, NE 68509

IN CASE OF: S-98-0645, State v. Juan Franco, Jr.

Appellee/Motion for Rehearing & Brf **filed** 06/07/99 **has been reviewed by the court and the following order entered:** Motion of appellee for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

Neb. Rev. Stat. § 28-431 (Cum. Supp. 1998):

28-431. Seized without warrant; subject to forfeitures; disposition; manner; when; accepted as evidence; court costs and expenses. (1) The following shall be seized without warrant by an officer of the Division of Drug Control or by any peace officer and the same shall be subject to forfeiture: (a) All controlled substances which have been manufactured, distributed, dispensed, acquired, or possessed in violation of the Uniform Controlled Substances Act; (b) all raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, administering, delivering, importing, or exporting any controlled substance in violation of the act; (c) all property which is used, or is intended for use, as a container for property described in subdivisions (a) and (b) of this subsection; (d) all drug paraphernalia defined in section 28-439; (e) all books, records, and research, including, but not limited to, formulas, microfilm, tapes, and data, which are used, or intended for use, in violation of the act; (f) all conveyances including, but not limited to, aircraft, vehicles, or vessels which are used, or intended for use, in transporting any controlled substance with intent to manufacture, distribute, deliver, dispense, export, or import such controlled substance in violation of the act; and (g) all money used, or intended to be used, to facilitate a violation of the act.

(2) Any property described in subdivision (1)(f) of this section which is used, or intended for use, to transport any property described in subdivision (1)(a) or (b) of this section is hereby declared to be a common nuisance, and any peace officer having probable cause to believe

that such property is so used, or intended for such use, shall make a search thereof with or without a warrant.

(3) All money that a law enforcement agency proves was furnished by such agency shall be returned to the agency. All property seized without a search warrant shall not be subject to a replevin action and: (a) All property described in subdivisions (1)(a) to (1)(e) of this section shall be kept by the property division of the law enforcement agency which employs the officer who seized such property for so long as it is needed as evidence in any trial; and (b) when no longer required as evidence, all property described in subdivision (1)(e) of this section shall be disposed of on order of a court of record of this state in such manner as the court in its sound discretion shall direct, and all property described in subdivisions (1)(a), (b), (c), and (d) of this section, that has been used or is intended to be used in violation of the act, when no longer needed as evidence shall be destroyed by the law enforcement agency holding the same or turned over to the department for custody or destruction, except that a law enforcement agency may keep a small quantity of the property described in subdivisions (1)(a), (b), (c), and (d) of this section for training purposes or use in investigations. Any large quantity of property described in subdivisions (1)(a), (b), (c), and (d) of this section, whether seized under a search warrant or validly seized without a warrant, may be disposed of on order of a court of record of this state in such manner as the court in its sound discretion shall direct. Such an order may be given only after a proper laboratory examination and report of such property has been completed and after a hearing has been held by the court after notice

to the defendant of the proposed disposition of the property. The findings in such court order as to the nature, kind, and quantity of the property so disposed of may be accepted as evidence at subsequent court proceedings in lieu of the property ordered destroyed by the court order.

(4) When any property described in subdivision (1)(f) or (g) of this section is seized, the person seizing the same shall cause to be filed, within ten days thereafter, in the district court of the county in which seizure was made, petition for disposition of such property. The proceedings shall be brought in the name of the state by the county attorney of the county in which such property was seized. The petition shall describe the property, state the name of the owner if known, allege the essential elements of the violation which is claimed to exist, and conclude with a prayer for disposition. The county attorney shall have a copy of the petition served upon the owner of or any person having an interest in the property, if known, in person or by registered or certified mail at his or her last-known address. If the owner is unknown or there is a reasonable probability that there are unknown persons with interests in the property, the county attorney shall provide notice of the seizure and petition for disposition by publication once a week for four consecutive weeks in a newspaper of general circulation in the county of the seizure. At least five days shall elapse between each publication of notice.

At any time after seizure and prior to court disposition, the owner of record of such property may petition the district court of the county in which seizure was made to release such property, and the court shall order the release of the property upon a showing by the owner

that he or she had no knowledge that such property was being used in violation of the Uniform Controlled Substances Act.

Any person having an interest in the property proceeded against or any person against whom civil or criminal liability would exist if such property is in violation of the act may, within thirty days after seizure, appear and file an answer or demurrer to the petition. The answer or demurrer shall allege the claimant's interest in or liability involving such property. At least thirty but not more than ninety days after seizure, there shall be a hearing before the court. If the claimant proves by a preponderance of the evidence that he or she (a) has not used or intended to use the property to facilitate an offense in violation of the act, (b) has an interest in such property as owner or lienor or otherwise, acquired by him or her in good faith, and (c) at no time had any knowledge that such property was being or would be used in, or to facilitate, the violation of the act, the court shall order that such property or the value of the claimant's interest in such property be returned to the claimant. If there are no claims, if all claims are denied, or if the value of the property exceeds all claims granted and it is shown beyond a reasonable doubt that such property was used in violation of the act, the court shall order disposition of such property at such time as the property is no longer required as evidence in any criminal proceeding. The court may order that property described in subdivision (1)(f) of this section be sold or put to official use by the confiscating agency for a period of not more than one year and that when such property is no longer necessary for official use or at the end of two years, whichever comes first, such property

shall be sold. Proceeds from the sale of the property and any money described in subdivision (1)(g) of this section shall be distributed pursuant to section 28-1439.02. Official use shall mean use directly in connection with enforcement of the act.

Any court costs and fees and storage and other proper expenses shall be charged against any person intervening as claimant or owner of the property unless such person shall establish his or her claim. If a sale is ordered, the officer holding the sale shall make a return to the court showing to whom the property was sold and for what price. This return together with the court order shall authorize the county clerk to issue a title to the purchaser of the property if such title is required under the laws of this state.